Filed 5/16/07 Porfolio Recovery v. Robinson CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PORTFOLIO RECOVERY ASSOCIATES,

Plaintiff and Appellant,

v.

KEITH AND ANNETTE ROBINSON,

Defendant and Respondent.

2d Civil No. B191880
(Super. Ct. No. CIV 232684)
(Ventura County)

Portfolio Recovery Associates appeals from an order setting aside a default and default judgment entered against Keith A. Robinson and Annette L. Robinson, respondents. Appellant contends that the trial court abused its discretion. We affirm.

Factual Background

Keith Robinson (Robinson) is an attorney. He appeared pro se and as counsel for Annette Robinson (Annette). On December 14, 2005, the trial court sustained respondents' demurrer to appellant's first amended complaint. It granted appellant permission to "file a second amended complaint by January 9, 2006."

On January 9, 2006, appellant filed its second amended complaint. On January 6, 2006, the complaint was served by mail on respondents. On February 21, 2006,

default was entered for respondents' failure to file a responsive pleading. On February 23, 2006, respondents filed a request to set aside the default.

On February 28, 2006, appellant filed a request for entry of a default judgment. On March 18, 2006, a default judgment totaling $39,873.10 was entered against respondents.

On April 25, 2006, the trial court granted respondents' motion to set aside the default and default judgment "pursuant to the discretionary provisions of Code of Civil Procedure section 473 (b)."[1]

Standard of Review

"Section 473 permits the trial court to 'relieve a party . . . from a judgment, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise or excusable neglect.' A motion seeking such relief lies within the sound discretion of the trial court, and the trial court's decision will not be overturned absent an abuse of discretion. [Citations.] However, the trial court's discretion is not unlimited and must be ' "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' " [Citation.] [¶] Section 473 is often applied liberally where the party in default moves promptly to seek relief, and the party opposing the motion will not suffer prejudice if relief is granted. [Citations.] In such situations 'very slight evidence will be required to justify a court in setting aside the default.' [Citations.] [¶] Moreover, because the law strongly favors trial and disposition on the merits, any doubts in applying section 473 must be resolved in favor of the party seeking relief from default. [Citations.] Therefore, a trial court order denying relief is scrutinized more carefully than an order permitting trial on the merits. [Citations.]" (*Elston v. City of Turlock* (1985) 38 Cal.3d 227, 232 -234, fns. omitted].)

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]" (*Shamblin v. Brattain* (1998) 44 Cal.3d 474, 478-479.)

Discussion[2]

On behalf of himself and Annette, Robinson filed the motion to set aside the default. In a declaration under penalty of perjury, Robinson stated that, when the trial court sustained the demurrer to the first amended complaint on December 14, 2005, he had "calendared a response date of February 21, 2006." His selection of this date was based on the assumption that the second amended complaint "could have been filed on January 17, 2006." When the second amended complaint was filed on January 9, 2006, through "inadvertence and excusable neglect" Robinson failed to recalendar the response date. Robinson further stated, "A response was prepared and attempted to be filed on February 21, 2006 but a default had been entered a few moments before."

Appellant contends that the trial court abused its discretion in setting aside the default and default judgment because respondents' failure to timely file a responsive pleading was not due to inadvertence or excusable neglect. Appellant argues: "It is not reasonable to calendar a response date based on the last date that a complaint could be filed. In addition, [Robinson] was inexcusably negligent in initially presuming that [appellant] would file on January 17 . . . when the minute order on which he based his response date . . . stated the time to amend expired on January 9 . . . ."

"The test of whether neglect was excusable is whether ' " a reasonably prudent person under the same or similar circumstances" might have made the same error.

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[2] No respondents' brief was filed. Accordingly, the appeal is submitted on appellant's opening brief, the record, and any oral argument by appellant. (Cal. Rules of Court, rule 8.220(a)(2).)

[Citations.]' [Citation.]" (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1128.) In view of the liberality with which section 473 has been applied in relieving parties from their defaults, we conclude that the trial court did not abuse its discretion. "[C]alendar errors by an attorney or a member of his staff are, under appropriate circumstances, excusable. [Citations.]" (*Nilsson v. City of Los Angeles* (1967) 249 Cal.App.2d 976, 980.) In *Nilsson* the appellate court concluded that the trial court had abused its discretion in finding an office calendaring error to be inexcusable even though the attorney's affidavit did "not state facts showing how the calendaring error occurred in that it [did] not indicate what office procedure was followed in order to make timely entries, nor [did] it indicate who made the error." (*Id*., at p. 982.) In *Haviland v. Southern California Edison Co.* (1916) 172 Cal.601, 605, our Supreme Court declared: "It is not necessary to cite the many decisions in which this court has held that the power given by section 473 to relieve from defaults is to be liberally exercised with a view to bringing about a determination upon the merits. . . . It will hardly be claimed that the inadvertent entry of a wrong date in the book or journal in which defendant's attorneys kept a record of the proceedings to be taken by them could not fairly have been held by the trial court to furnish sufficient ground for relief under the remedial provisions of section 473."

In reviewing the trial court's order setting aside the default and default judgment, we also consider respondents' promptness in seeking relief upon learning of the entry of the default. Respondents moved to set aside the default only two days after it was entered. In addition, we consider appellant's failure to show that it would suffer prejudice from the granting of relief.

Accordingly, appellant has not carried its burden of establishing an abuse of discretion. (See *Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448 [an attorney who seeks to prove an abuse of discretion "is confronted with more than a daunting task" and faces an "uphill battle"].)

Disposition

The order setting aside the default and default judgment is affirmed. Costs on appeal, if any, are awarded to respondents.

NOT TO BE PUBLISHED.

YEGAN, Acting P.J.

We concur:

COFFEE, J.

PERREN, J.

Steven Hintz, Judge

Superior Court County of Ventura

Kurtiss A. Jacobs; Eskanos & Adler, A Professional Corporation, for Appellant.

No appearance for Respondent.